No. ___ · 2007

IN THE

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION, REGINA REDERFORD, ROBIN CHRISTY,

Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD D. ACKERMAN *
SCOTT D. LIVELY
MICHAEL W. SANDS, JR.
PRO-FAMILY LAW CENTER
41690 Enterprise Circle North, Ste. 216
Temecula, California 92590
(951) 308-6454

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

1. Does the City of Oakland's opening of a limited public forum, which allows city employees to post political, religious, and social views on an employee bulletin board and interoffice e-mail system, require a strict scrutiny standard of review where viewpoint discrimination has been enforced against only select employees?

2. When does a municipal employer have a "legitimate administrative interest" in censoring the terms "natural family," "marriage," and "family values" on an open employee bulletin board and interoffice e-mail system where employee views about social events, hate, religion, homosexuality, terrorism, politics, and war are allowed?

3. Can a public official's qualified immunity be abrogated when he/she rejects a faith-based organization's equal access to an employee bulletin board because the terms "natural family," "marriage," and "family values" are considered disruptive to the efficient operation of a municipal workplace?

4. Is it a prior restraint for a municipal employer to declare, as a matter of policy, the terms "natural family," "marriage" and/or "family values" to be hate-speech per se'?

LIST OF ALL PARTIES

Petitioners: Good News Employee Association
Regina Rederford
Robin Christy

Respondents: Joyce M. Hicks, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland.

Robert C. Bobb, in his individual and official capacities as the City Manager of the City of Oakland.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	ii
TABLE OF CITED AUTHORITIES	v
CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE	1
STATEMENT OF JURISDICTIONAL BASIS	2
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
A. Introduction To Legal Need For Review	3
B. Basic Statement Of Facts Justifying Review	6
ARGUMENT FOR REVIEW	11
I. RESPONDENTS' ACTIONS CONSTITUTED A VIOLATION OF PETITIONERS' CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO FREE SPEECH; REVIEW IS NECESSARY TO REESTABLISH THE RIGHT OF THOUSANDS OF EMPLOYEES TO SPEAK PEACEFULLY ON ISSUES OF PUBLIC CONCERN	11
II. STRICT SCRUTINY SHOULD HAVE BEEN USED TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENTS' ACTIONS	16

TABLE OF CONTENTS—Continued

	Page
III. THE NINTH CIRCUIT COURT OF APPEALS' DECISION GIVES GOVERNMENT EMPLOYERS UNBRIDLED DISCRETION TO REGULATE THE FREE SPEECH RIGHTS OF EMPLOYEES	18
CONCLUSION	19
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	6a
APPENDIX D	26a
APPENDIX E	65a

TABLE OF AUTHORITIES

CASES	Page
Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002)	12
Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983)	3, 5
Good News Club v. Milford Cen. School, 533 U.S. 98 121 S.Ct. 2093 (2001)	18
Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968)	5, 13, 16, 17
Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001)	14
Pool v. Vanrheen, 297 F.3d 899 (9th Cir. 2002)	13
Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 115 S.Ct. 2510	16
Sonada v. Cabrera, 255 F.3d 1035 (9th Cir. 2001)	12
Waters v. Churchill, 511 U.S. 661, 114 S.Ct. 1878 (1994)	5
Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269 (1981)	18

CONSTITUTIONAL PROVISIONS	
The First Amendment to the United States Constitution	*passim*
The Fourteenth Amendment to the United States Constitution	2

STATUTES	
Title 28 U.S.C § 1254(1)	2
Title 42 U.S.C. § 1983	2

IN THE

Supreme Court of the United States

No. ___

GOOD NEWS EMPLOYEE ASSOCIATION,
REGINA REDERFORD, ROBIN CHRISTY,
Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the Northern District of California's ruling appears in the Appendix hereto along with the District Court's rulings in favor of the Respondents.

STATEMENT OF JURISDICTIONAL BASIS

Title 28, U.S.C § 1254(1), provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

The final judgment and memorandum of the Ninth Circuit Court of Appeals was filed on March 5, 2007. This timely petition for review follows the same.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THIS CASE

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution states:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Introduction To Legal Need For Review

Discussions of faith, politics and current events are a normal and expected part of people's work lives in the United States. Employees' break-room, open bulletin board, or open e-mail system discussions are, frankly, a critical part of the dialogue about issues of the day. Indeed, a municipal employer, such as the City of Oakland, California, cannot silence specific employee views on issues of public concern, including same-sex marriage, without some showing of actual disruption in the workplace. *Connick v. Myers*, 461 U.S. 138, 151 (1983).

While it is true that municipal workplace discussions should never rise to the level of outright offense, discrimination, or actual hate-speech, one can readily accept that a discussion may be intense or even heated where sensitive topics are discussed in the workplace during break time or in a common area. However, the potential for vigorous discussion cannot be a basis for a municipality's complete ban on certain forms of speech by its employees as occurred in this case.

Contrary to the Ninth Circuit and District Court's rulings in this case, public employee discussion on issues such as a ban on same-sex marriage is not disruptive per se' to the workplace—even in the case of a municipal employer. (Appendix

pp. 19a-20a, 41a-43a). Indeed, a municipal employer's complete ban on printed or verbal speech favoring a traditional view of marriage and the family is, constitutionally speaking, unacceptable.

With the likelihood of a lively and important national debate about same-sex relationships, religion, and the future of our nation in the upcoming 2008 Presidential Election, there exist compelling reasons for granting review in this case. If review is not granted, there is an imminent likelihood that thousands of California's Bay Area employees will be chilled in the exercise of free speech rights or completely silenced during a time where friendly debate about national issues should not only be allowed but invited.

In contravention to well established First Amendment jurisprudence, the Ninth Circuit Court of Appeals has determined that the terms "natural family," "marriage," and "family values" are forms of speech that may be completely restrained by a municipal employer through a purported interest in preventing discrimination against homosexuals and other groups. (Appendix pp. 3a-4a).

Ironically, the Petitioners in this case are African-American, Christian, females who never intended on discriminating against anyone and simply wanted a fair chance to engage in the same dialogues about family, politics, and religion that other employees were allowed by the City of Oakland. As can be seen from Appendix pp. 65a-89a, taken directly from the record below, all variants of political speech were allowed in the City of Oakland's open e-mail system and employee bulletin board. Speech was allowed concerning war, healthcare, peace, employee outsourcing, sports, racism, slavery, spirituality, hate, God, the Gay-Straight Employee Alliance, tolerance, homosexuality, 'coming out,' diversity, Christ, the Bible, sexuality, and a host of other topics. The only speech banned was that of the Petitioners as found at Appendix p. 65a (referring to the "natural family," "marriage" and "family

values"). In this vein, it is noteworthy that the District Court found that the basic "facts are not in material dispute." (Appendix p. 7a).

To allow the lower court's ruling to stand, exposes every public employee to outright censorship by a municipal employer for merely mentioning words such as the "natural family," "marriage", and "family values," which relate to issues at the forefront of national debate. In fact, the lower courts' decisions could preclude public employees from so much as mentioning the birth of one's child or the fact that they were just married because this might theoretically offend a co-worker. (Appendix pp. 7a-9a).

Simply stated, the Ninth Circuit and the District Court went way too far afoul of established constitutional and common sense jurisprudence. This foray brings this case squarely within the standards justifying review under Rules of the Supreme Court of the United States, Rule 10. The marketplace of ideas has been unreasonably restricted by the actions of Respondents and they have established public policy contrary to the First Amendment. The purpose of the 'marketplace of ideas' principle is to allow the free debate of various issues of public concern. The marketplace of ideas does not allow for discrimination based on the subject matter or viewpoint of an individual's or group's speech simply because it *might* offend someone.

If allowed to stand, the integrity of this Court's essential holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) is fundamentally altered and thousands of municipal employees will remain subject to a prior restraint on speech that could, in some vague way, be determined hate-speech regardless of context or normality. Furthermore, the Ninth Circuit's judgment conflicts with this Court's prior holdings in *Waters v. Churchill*, 511 U.S. 661 (1994) and in *Connick v. Myers*, 461 U.S. 138 (1983), which recognize protection

for a public employee's nondisruptive speech on matters of public concern.

B. Basic Statement Of Facts Justifying Review

Petitioners are employees of the City of Oakland and co-founders of Good News Employees Association (hereinafter referred to as "GNEA"), an unincorporated association of persons. Petitioners and their associates, regularly engage in prayer and other peaceful activities as part of their expressive, political, and religious activities with GNEA. Petitioners have advertised their City of Oakland employee club activities by way of a flyer.

The flyer stated nothing more than exactly the following:

> "Preserve Our Workplace With Integrity
>
> Good News Employee Association is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family Values.
>
> If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ 238-7534 or Robin Christy @ 238-6993."

The flyer was also occasioned by the depiction of a menorah. (See Appendix p. 65a).

The flyer came about after other employee groups, including those that promote equality for homosexuals, were given free access to the e-mail system and a bulletin board of the City of Oakland for purposes of advertising political activities. (Appendix pp. 66a-89a). When Petitioners asked for the same opportunity to communicate in a like manner to their co-employees, they were denied equal accommodation by Respondents. In furtherance of the City's objectives, Petitioners' flyer was taken down and presumably destroyed by City officials.

In direct response to the peaceful activities of the Petitioners, Oakland's officials enacted a restrictive policy known as Administrative Instruction 71. The policy deems the above referenced flyer and its contents to be "homophobic" and disruptive per se'. The justification for imposition of the policy was stated as follows:

> "We have recently had incidents in our agency where staff has inappropriately posted printed materials that are in violations of AI 71. Specifically flyers were placed in public view which contained statements of a homophobic nature and were determined to promote sexual orientation based harassment. [. . .] Failure to comply with the directives in AI 71 and 140 will include disciplinary action up to and including termination."

The policy was enacted and enforced by the individual Respondents named in this lawsuit. Defendant Joyce Hicks was the Deputy Director of the Community and Economic Development Agency of the City of Oakland. Robert C. Bobb was the City Manager of Oakland at the time. Hicks answered to Mr. Bobb. Bobb expected, and Hicks admitted to, being personally responsible for enforcing an anti-discrimination policy known as City Policy No. AI71 within Petitioners' specific department. Hicks also allowed the existence of more than one employee bulletin board in her department and allowed "nondiscriminatory" content to be posted on these boards even after AI71 was enacted. Hicks was also responsible for enforcing AI71 as against bulletin board postings.

Hicks personally, while acting under color of law, took punitive action against the First Amendment rights of the Petitioners in the form of threatening Petitioners continued employment if they continued to post the subject flyer. Punitive action was not, and has never been, taken against other employees responsible for posting on bulletin boards views about Osama Bin Laden, spiritual matters, sports,

taxes, God, social events, hate (including hate against religion), terrorism and God, Christmas, slavery, fascism, communism, war, and mass murder.

The employees who actually carried out the censorship of Petitioners' speech worked for Hicks. Her subordinates' censorship was initially ratified by Hicks in January 2003. Hicks further ratified and promoted Wong's conduct on or about February 20, 2003, when she declared an intention to continue enforcement of AI71 against Petitioners and other employees in the manner she had with regard to the flyer. As applied by Hicks, AI71 unconstitutionally precludes anything that can be construed to even question the propriety of homosexuality (even unsafe practices).

Respondent, Robert C. Bobb, was the City Manager of Oakland. He was also almost exclusively responsible for the application, enforcement, and drafting of Policy AI71. Moreover, he personally, while acting under the color of law, took punitive action, through his employees (including Hicks), against Petitioners by allowing the application of AI71 against Petitioners' activities.

Respondent, Robert C. Bobb, as the City Manager, was a final policymaker for Oakland at all times relevant herein. His actions resulted in execution and interpretation of Oakland's official ordinances and policies. Bobb was personally responsible for drafting and enforcing (through his employees) Administrative Instruction No. AI71, which was applied against the activities of the Petitioners.

Respondent, Robert C. Bobb, was admittedly the only and "final policy maker" as to all administrative instructions during his tenure, including AI71. Bobb was responsible for setting policy on AI71 in 2002 and 2003, which were the relevant years. Moreover, not even the City Attorney had more authority over administrative policies than Mr. Bobb. Respondent Bobb knew that his employees did have First

Amendment rights that could be exercised in the workplace and that he could not violate their rights.

In or about March, 2002, a homosexual group of employees was given free access to the e-mail and written announcement systems of Oakland for purposes of advertising their various associational, political, and other activities. References to sexuality were permitted to be discussed in the workplace. Employees were allowed to be openly expressive about their personal sexual practices. In fact, events such as "Happy Coming Out Day" were promoted under Bobb's management. Respondent Bobb also knew that a Gay Straight Employee Alliance had been formed by his employees in 2002. During Bobb's tenure, employees were allowed to discuss just about anything they wanted except for threatening or actual violence against other employees. In fact, according to Bobb's deposition testimony, employees could actually refer to each other as "niggers" or other such derogatory terms, as a form of "workplace" speech. It's hard to believe Respondent Bobb would allow the term "nigger" to be used within the workplace but not the terms "natural family, marriage and family values."

When Petitioners later asked to be given the same opportunity to communicate with other employees about their Christian activities and views on family, they were denied equal accommodation. Respondents did so because they do not want the *expressed* Christian beliefs, practices, and activities of Petitioners to conflict with the discussion of sexual practices that other employees, including one Judith Jennings, were allowed to openly engage in during 2002-2003. (Appendix pp. 18a-20a).

Respondent Hicks was aware that double standards were being applied to employees' expressive activity in late 2002 through early 2003. Hicks also feels that it is not a violation of AI71 related policies for employees to openly use exclusionary slurs such "homophobes" against each other. More-

over, terms and slurs that knowingly exclude heterosexuals or celibate persons are ostensibly permitted to be openly used by Hicks' employees. Hicks made no attempt to accommodate views concerning homosexuality by Catholic, Muslim, Protestant or other religious adherents under her supervision. She didn't even know what the term "accommodate" was, even after 26 years as an attorney. Bobb, similarly, had no idea that religious views were a part of the City's diversity in 2002-2003. However, Bobb recognize that all employee classes (race, religion, etc.) must be treated equally in terms of First Amendment exercise in the workplace.

On or about November 18, 2002, Petitioners attempted to announce the existence and activities of GNEA to other employees of the City of Oakland. At the direction, bequest, and order of Respondent Hicks, the flyer was forcibly removed by one of her subordinates on or about January 3, 2003, from the employee bulletin board of the department that Petitioners work in and other locations. Respondents admit that the flyer was caused to be taken down because of its content (i.e. its words and meaning to the reader).

Petitioners had not caused a workplace disruption by their activities. Moreover, Respondent Bobb was unaware of any instance where expression of religious beliefs or views on gay marriage ever interfered with City operations. While actual discrimination can be prevented under AI71, there is absolutely no evidence that the flyer or Petitioners 'treated anyone differently' in advising as to the nature of the club or contact information. Hicks defines "discrimination," within the meaning of AI71, as requiring prejudicial treatment of a class of persons. Petitioners were not given, nor was there in place, a formal internal appeals process that would have allowed a challenge to the decision to censor the flyer. Moreover, Respondents' disparaging and vitriolic characterization of Robin Christy and Regina Rederford is reprehensible. At no

time have either of these long-term employees ever been hateful toward homosexuals.

In early 2003, Respondents, while acting under color of law, developed, implemented, enforced, and instituted AI71. AI71 did not exist at the time that Petitioners originally posted their flyer (i.e., 11/03). The policy is presently being unequally enforced and was a direct and discriminatory response against the First Amendment activities of Petitioners. Respondents have not attempted to similarly silence any other group of employees, although homosexual advocacy groups and other advocacy groups exist at Respondents' offices and are given free reign to discuss and promote their agendas and views, short of actual violence and discrimination within the workplace. (Appendix pp. 80a-81a).

In fact, Judith Jennings, the sole complaining co-worker in this case initially desired to attend Petitioners' meetings, thus demonstrating no actual disruption or threat of disruption being caused by the posting of the flyer. Moreover, Respondents apparently took no action against other employees who made derogatory comments about the Bible during this same time period (which was prohibited according to Bobb), yet, at the same time, Bobb found Petitioners' flyer to contain a "certain religious ideal," thereby making "her [petitioner] subject to discipline . . ." Respondents took down the flyer because of its "editorial comment."

ARGUMENT FOR REVIEW

I. RESPONDENTS' ACTIONS CONSTITUTED A VIOLATION OF PETITIONERS' CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO FREE SPEECH: REVIEW IS NECESSARY TO REESTABLISH THE RIGHT OF THOUSANDS OF EMPLOYEES TO SPEAK PEACEFULLY ON ISSUES OF PUBLIC CONCERN

As the Ninth Circuit Court of Appeals correctly pointed out, qualified immunity protects Respondents unless the court

determines that Petitioners "have shown that the action complained of constituted a violation of their constitutional rights," "the violated right was clearly established, and . . . a reasonable public official could not have believed that the particular conduct at issue was lawful." *Butler v. Elle*, 281 F.3d 1014, 1021 (9th Cir. 2002) (citing *Sonada v. Cabrera*, 255 F.3d 1035, 1040 (9th Cir. 2001). The Ninth Circuit Court of Appeals found that Petitioners were unable to satisfy these three (3) criteria in order to abrogate Respondents' qualified immunity. (Appendix B at pp. 3a-5a).

Indeed, the Ninth Circuit approved the actions of Respondents in taking down Petitioners' flyer because the words "natural family, marriage, and family values" were somehow disruptive to the efficient order of their workplace and/or might offend another co-worker does not serve a "legitimate administrative interest." This decision was made even though Respondents allowed various others groups and individuals to post their views and opinions about other hot issues of the day on the bulletin board. Not only were views about Osama Bin Laden, spiritual matters, sports, taxes, God, social events, hate (including hate against religion), terrorism and God, Christmas, slavery, fascism, communism, war, and mass murder allowed free access to the employee bulletin board, but, according to the record below, Respondents actively allowed the use of derogatory terms within the workplace, including, but not limited to, the term "nigger." It's difficult to believe the terms "natural family, marriage, and family values" would be offensive to a municipal employer and deemed likely to disrupt the efficient order of the workplace when various derogatory terms, including the term "nigger," were used and implicitly endorsed under Respondents' authority.

The "legitimate administrative interests" of Respondents do not outweigh Petitioners' interest in their constitutional right to freedom of speech. The alleged actual disruption in

this case amounted to nothing more than one complaint by one lesbian co-worker, Judith Jennings, whose subjective private beliefs in the meaning of the words "natural family, marriage and family values" caused Petitioners' flyer to be taken down by Respondents.

Looking at the words actually uttered in the Petitioners' flyer, without taking into consideration the misrepresented private beliefs of the complainant or the Respondents, there is no reference to sexual orientation, homosexuality, or any other words which discriminate, harass and/or might offend a particular "protected class." In fact the Ninth Circuit Court of Appeals erred in diving into the private beliefs of the complainant and Respondents in determining how the words "natural family, marriage and family values" affected the complainant and Respondents' workplace. *Pool v. Vanrheen* 297 F.3d 899, 906 (9th Cir. 2002) and *Pickering v. Board of Education*, 391 U.S. 563 (1968) require that a court only look at the speech as actually uttered, not the private beliefs of the speakers. The speech as actually uttered by Petitioners in their flyer is no more "offensive" than the term "nigger" which was allowed to be used within the workplace under Respondents' authority. It is only the Respondents' own restrictive connotation of the language that gives rise to the automatic assumption that it is somehow hate speech. The Ninth Circuit affirmation of such reasoning creates a dangerous precedent and a deviation from constitutional norms.

Although the only limit placed on Petitioners' right to freedom of speech was the removal of a single flyer from the bulletin board with a concomitant threat of termination for future use of 'offensive' words, the decision by Respondents did in fact violate the constitutional rights of Petitioners. Respondents did not, nor could a similarly situated municipal employer, show that the words "natural family, marriage and family values" were likely to bring about grave and imme-

diate danger to the workplace and/or disrupt the operations of a city. Prior restraint is not justified.

The Ninth Circuit's description of Petitioners' speech interest as "vanishingly small," especially when the issue of same-sex marriage and homosexual rights are heated political topics at the forefront of national debate, undermines the foundation and purpose of the First Amendment. Political speech is "given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment." *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 224 F.3d 1007, 1019 (9th Cir. 2001). If the use of a flyer is what the Ninth Circuit considered to be a "small" interest, one should not forget that many of this Court's seminal rulings come from the distribution of a flyer, standing on a soapbox, wearing a t-shirt, carrying a picket sign, or other simple forms of expression. The Ninth Circuit has seemingly forgotten that the substance of political speech is rarely a "vanishingly small" interest insofar as the Constitution is concerned.

The issues to be discussed in the GNEA are matters of public concern, just as same-sex marriage and homosexual rights are matters of public concern. By allowing an unchilled discussion and/or debate over the meaning of the terms "natural family, marriage and family values" and the social impact these terms have on society versus the impact the homosexual rights movement has on society, actually aligns with the original intent of the founding fathers as it pertains to the First Amendment.

To find that Respondents had a more substantial interest in maintaining the efficient operation of their office than Petitioners had in their speech, requires a showing that Petitioners' flyer discriminated against a "protected class," constituted hate speech, and/or disrupted the workplace in some way. It is a far stretch of the imagination to conclude the words "natural family, marriage and family values"

discriminate against homosexuals, constitute hate speech towards homosexuals, and/or will disrupt the workplace and interfere with the efficient operation of the workplace in some way. None of these terms can be construed to be inflammatory towards homosexuals nor directly condemning them and/or their lifestyle. The alleged "homophobic" nature of Petitioners' flyer was conjured up by the Respondents' subjective belief in what they thought the terms "natural family, marriage and family values" meant.

The actions of Respondents continue to violate the constitutional rights of Petitioners and establish bad public policy in violation of prior rulings by this Court and the spirit of the First Amendment. The right to free speech is a constitutional right that is clearly established and is one of the most highly protected and cherished constitutional rights afforded to all American citizens. Respondents knew that their employees, including Petitioners, did have First Amendment rights that could be exercised in the workplace and that could not be violated absent actual violence and/or discrimination. A reasonable public official could not have believed that the particular conduct engaged in by Respondents was lawful, especially when Respondents allowed derogatory terms to be used throughout the workplace and allowed various other expressive views and opinions by other employees to be freely placed on the employee bulletin board with no threat of disciplinary action.

The only discrimination that exists is the Respondents' own stated desire to regulate those views and opinions which they believe do not conform with their subjective beliefs. If anything, Respondents have created a hostile work environment by discriminating against Petitioners and their beliefs in the "natural family, marriage and family values." This Court should not allow such censorship to stand.

II. STRICT SCRUTINY SHOULD HAVE BEEN USED TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENTS' ACTIONS

Although *Pickering* is the leading authority on the government's power to regulate public employees' speech, Respondents cannot show that the interest in maintaining the efficient operation of their workplace outweighs the Petitioners' right to engage in the debate over homosexual rights versus those of the "natural family, marriage and family values." Supporting this argument is the fact that Respondents allowed access to the employee bulletin board to employees and groups who expressed views about Osama Bin Laden, spiritual matters, sports, taxes, God, social events, hate (including hate against religion), terrorism and God, Christmas, slavery, fascism, communism, war, and mass murder, views which clearly have the potential of disrupting the Respondents' workplace even more than the terms "natural family, marriage and family values."

Respondents refused to accommodate the religious views and speech rights of Petitioners yet fully accommodated other groups, including those who were actively against Petitioners' beliefs in traditional family values, values that have sustained this Country for hundreds of years. Respondents opened up a limited public forum when they allowed all employees to post political, religious, and social views on an employee bulletin board and e-mail system. As this Court has established, when a non-traditional forum is intentionally opened for public discourse, which the bulletin board at issue in this case was, it creates a designated public forum and restrictions on speech are analyzed with the same strict scrutiny as a traditional public forum. As such, regulations on speech must be viewpoint neutral and reasonable in light of the purpose served by the forum. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829.

Based on the various flyers and materials which were allowed free access to the employee bulletin board, it appears the purpose served by the bulletin board and e-mail system was to open up a forum whereby City employees could express their views and opinions on various issues of the day. (Appendix pp. 65a-89a). The actions of Respondents in taking down the flyer posted by Petitioners were neither viewpoint neutral nor reasonable given the numerous other flyers which were allowed to remain; flyers which expressed views pertaining to war, religion, social events, hate and other hot issues of the day.

Respondents' actions do amount to viewpoint discrimination. Therefore, strict scrutiny must be applied in determining the constitutionality of Respondents' actions. As such, Respondents must demonstrate a compelling state interest which is narrowly tailored to justify their decision to take down Petitioners' flyer. A compelling state interest cannot be shown when Respondents encouraged the use of derogatory terms within the workplace, terms which any reasonable person would be offended by, and allowed numerous other flyers to be posted on the bulletin board without the threat of disciplinary action. The decision to take down Petitioners' flyer because their message contained the innocuous terms "natural family, marriage, and family values" was the result of one complaining party and Respondents' subjective belief that these terms were not appropriate within the workplace.

Even if "forum analysis" is not appropriate in this case because of the governmental employer/employee relationship that existed, under *Pickering*, Petitioners' speech rights would still be protected as it pertains to a matter of public concern and Respondents cannot demonstrate that these terms would have any more of an impact on the efficient order of the workplace than the term "nigger" would. Respondents' actions in taking down Petitioners' flyer was the direct result of

the content of Petitioners' speech and therefore strict scrutiny must be applied.

III. THE NINTH CIRCUIT COURT OF APPEALS' DECISION GIVES GOVERNMENT EMPLOYERS UNBRIDLED DISCRETION TO REGULATE THE FREE SPEECH RIGHTS OF EMPLOYEES

To allow the Ninth Circuit Court of Appeal decision to stand, dangerously opens the door to precluding any mention of traditional family values, religion and/or disapproval of the homosexual lifestyle within the workplace. The marketplace of ideas principle cannot tolerate this unbridled prior restraint given to government employers in determining which employees speech is acceptable and which is not.

The Constitution demands equal protection of its laws to all individuals without favoritism towards one group or individual versus another. Respondents denied Petitioners equal protection of the law when they chose to favor one individual or group's views over that of Petitioners. Respondents opened up a forum whereby employees could express their views and opinions on various issues of the day. Under most circumstances, one has the right to believe and profess whatever religious doctrine one desires and great protection is afforded to this element of the Constitution. *See generally, Good News Club v. Milford Cen. School*, 533 U.S. 98 121 S.Ct. 2093 (2001); *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269 (1981).

Given the extreme consequences the Ninth Circuit Court of Appeals' decision will have on public employees' constitutional right to free speech, Petitioner respectfully prays for review in this case.

CONCLUSION

Based on the foregoing, review must be granted in this case in order to remedy the clear violation of Petitioners' free speech rights.

Respectfully submitted,

RICHARD D. ACKERMAN *
SCOTT D. LIVELY
MICHAEL W. SANDS, JR.
PRO-FAMILY LAW CENTER
41690 Enterprise Circle North, Ste. 216
Temecula, California 92590
(951) 308-6454

* Counsel of Record

Counsel for Petitioners

June 4, 2007